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CHARLES ELIOT FAWLEY
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IN THE

Supreme Court of the United States

October Term, 1947

No. 304

THE BROWN INSTRUMENT COMPANY,
Petitioner,

vs.

SAM B. WARNER, Register of Copyrights,
Respondent.

MEMORANDUM FOR PETITIONER IN OPPOSITION TO
THE MOTION OF FAWLEY-BROST COMPANY FOR
LEAVE TO FILE A BRIEF AS *AMICUS CURIAE.*

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

C. D. SPANGENBERG,
E. H. PARRY, JR.,
Of Counsel.

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**MEMORANDUM FOR PETITIONER IN OPPOSITION TO
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LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*.**

The Brown Instrument Company, which is petitioning this Court for a writ of certiorari in this cause, vigorously opposes the motion of Fawley-Brost Company, an outsider to the litigation, to file a partisan brief as *amicus curiae*, designed, for personally selfish reasons, to induce this Court to deny the writ and refuse to review the questions presented by the petition.

The reasons for petitioner's opposition to the motion, briefly stated, are as follows:

1. As appears on its face (p. 3, para. 7), the motion is made in disregard of Rule 27(9) of the Rules of this Court in that petitioner has refused its consent to the filing of the brief of Fawley-Brost Company. While the rule is not concerned with the *reason* consent to file such a brief is refused, the use Fawley-Brost makes of petitioner's refusal—and particularly the play on the word "private"—is

believed to warrant a brief statement of such reason. Consent was refused by petitioner because Fawley-Brost obviously could have no *proper* interest in whether or not petitioner secured copyright registration for the printed matter on charts resulting from petitioner's mathematical computations and calculations. Therefore, the only possible interest of Fawley-Brost in the case is the personal and selfish one of an avowed plagiarist. However, the case undeniably is of vast public importance because it affects the validity of thousands of copyright registrations now outstanding, not only of petitioner, but of other chart calculators as well.

2. In the next place, counsel for petitioner, a member of the Bar of this Court for more than twenty years, cognizant of his duty fairly and accurately to state the case and frame issues and questions presented by a petition for writ of certiorari, in the petition filed in this cause, has stated the case fairly and accurately and has framed the issues and questions presented, and has outlined the public importance of a consideration thereof by this Court. The motion for leave to file brief *amicus curiae* deliberately seeks to confuse those issues and questions by stating them differently and quite inconsistently therewith, and purports to support such irrelevant and unpropounded questions and issues with an asserted "counterstatement of the matters involved" which is unsupported by the record in the cause, by the petition for writ of certiorari, or by the facts. It is believed to be obvious that when a party to a litigation, for reasons deemed to be proper to its counsel, submits an issue for consideration by this Court as to whether or not it should be considered and passed upon, an outsider inevitably performs a disservice to the Court—as distinguished from serving the Court as a "friend"—deliberately to misstate the questions sought to be reviewed, as well as the material facts involved.

3. Also, it is difficult to conceive of a situation where the term "*amicus curiae*" can be more inapplicable than to Fawley-Brost Company, the motion and brief of which are so replete with inaccuracies and are so partial and biased that at times they border on the intemperate. Fawley-Brost Company is an avowed copyist and plagiarist (Motion, p. 2, para. 2). As such, unquestionably it would be fearfully interested in the issues considered by the Court *in the event writ of certiorari is granted*. But its questionable efforts to prevent a *review* of the case by this Court amply indicates the importance of and necessity for such review. The fundamental issue presented by the petition for writ of certiorari is whether or not the Register of Copyrights should issue certificates of copyright *to petitioner*. Obviously, Fawley-Brost Company has no proper interest in that question. To the contrary, and as made clear by its motion, Fawley-Brost Company's interest is to induce this Court *not* to review what is advanced by the petition for certiorari to be an unjust, inequitable and improper ruling by the Court below that *petitioner* is not entitled to copyright registration. It is obvious, therefore, that the interest of Fawley-Brost is purely personal and selfish, namely, to avoid its liability that properly might arise because of its avowed copying and plagiarism. Fawley-Brost Company certainly is not a "friend" of the Court in its present motion; it is a "friend" only of itself. And the filing of its motion in the effort to prevent review of the case by this Court is an eloquent expression of its realization that *a reversal of the judgment of the Court below is inevitable if this Court does review the case*.

4. Counsel for Fawley-Brost Company, no doubt with warranted egotism, boasts (p. 3, para. 5) that they, in effect, are the ones who have done everything that was done by the Government in the preparation for and trial of this cause. If that is the case, it certainly cannot be asserted

by them that the Government is not adequately represented. At the same time it fittingly demonstrates the want of necessity for, as well as the impropriety of, the Government filing *two* briefs in opposition to the petition for writ of certiorari—one formally by the Government (and probably prepared by counsel for Fawley-Brost if their boast is justified) in which the proprieties of presentation will be strictly adhered to according to the high standards of practice of the Department of Justice, and the other by counsel for Fawley-Brost allegedly as *amicus curiae* where the proprieties will be completely ignored if the present motion and supporting brief may be accepted as an example. It is believed that no such thing is necessary or should be permitted. It certainly is quite unfair to the petitioner to be subjected to two different attacks by the same party by the mere expedient of masquerading as *amicus curiae*. It is also believed that Rule 27(9) was framed by this Court to prevent any such situation as this from being sanctioned.

Conclusion.

For the foregoing reasons it is submitted that the motion of Fawley-Brost Company for leave to file a brief as *amicus curiae*, which brief has as its sole purpose to induce this Court not to review this case *because of the realization that if the case is considered by this Court on the merits it must be reversed*, should be denied.

Respectfully submitted,

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Of Counsel.